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No. _____

In The

Supreme Court of the United States

DAVID R. HENLEY, SR.,

Petitioner,

vs.

UNITED STATES AIR FORCE,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Military Judge erred in denying the defense motion to suppress evidence and a derived confession as fruits of evidence seized from the Petitioner's home in violation of the Constitution?

2. Whether allowing evidence of other sexual misconduct to show propensity, as applied, under Military Rule of Evidence 404(b), notwithstanding precedent to the contrary, applied to render a ruling consistent with legislative intent under Military Rules of Evidence 413 or 414, adopted subsequent to the alleged misconduct, violates the ex post facto prohibition of the Constitution?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, David R. Henley, Sr., respectfully prays that a writ of certiorari issue to review the August 17, 2000 opinion of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces dated August 31, 2000 is reported at 53 MJ 488 (2000) and is reprinted in the Petition Appendix ("App.") beginning at App. 1. No petition for rehearing was sought. The opinion of the United States Air Force Court of Criminal Appeals dated August 17, 1998, is reported at 48 M. J. 864 (1998) and is reprinted beginning at App. 18.

STATEMENT OF JURISDICTION

Petitioner seeks review of the United States Court of Appeals for the Armed Forces' Opinion dated August 31, 2000.

The United States Supreme Court has jurisdiction to review cases from the Court of Appeals for the Armed Forces by virtue of 28 U.S.C.A. 1254.

STATEMENT

This case presents the vexing reality of the ramifications of amendments to the Federal Rules of Evidence by the legislature to serve the interests of politics by unnecessarily creating a lowered standard of evidence in the prosecution of an unpopular social evil.

The off-shoot of Federal Rules of Evidence 413 and 414 permitting propensity evidence to be considered during the guilt/innocence phase of a trial involving alleged sex crimes are impermissible burdens to the fundamental right of the accused to proof beyond a reasonable doubt and the fundamental right to the presumption of innocence.

The reality of these impermissible burdens on fundamental rights are even more apparent when a sex crime is prosecuted for offenses against children, only an uncharged, extraneous wrong alleged in this case. In cases involving children, our society's instinct has always been to punish, more so than in other crimes. Thus, a belief we protect other children by lowering the standards of evidence rises from an appeal to emotion that too often blinds reason, permitting the innocent to be ensnared.

As the triers-of-fact, the judge and the jury stand as Captains at the bulwark of the Constitution to ensure the law is followed by the accused and the accuser, as well.

But good men and women cannot stand by and do nothing, allowing injustice to occur when the Captain abandons the ship, convicting the accused while using ex post facto laws or admitting evidence obtained in violation of the protections of the United States Constitution.

The Respondent was charged with consensual oral sodomy, two instances of committing indecent acts, and conduct unbecoming an officer and a gentlemen.

Even though the Special Agent for the Office of Special Investigations[1] possessed sufficient evidence to obtain a warrant for arrest, he also sought a warrant to search the Respondent's home for objects of criminal activity associated with uncharged offenses that were last seen five years ago in another state.

This Special Agent, in making application for the warrant, concealed that evidence from the magistrate by presenting only his affidavit and the supporting affidavit of an OSI Investigative Psychologist. The testimony presented, resulting from a collaboration to conform the facts presented between the Special Agent and the Psychologist that disguised "a hunch" as an expert opinion in order to obtain the warrant to search in this case.

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[1] Hereinafter referenced as "OSI".

Yet, the military judge for the court-martial denied the Respondent's motion to suppress the evidence seized and the derivative confession. The court found that even if probable cause was lacking that the very official executing the warrant who concealed facts and manipulated the opinions reflected in the affidavits acted in good faith.

At trial, testimony alleging past sex crimes were admitted for consideration by the jury as part of the prosecution's case in chief.

On appeal, the lower court held the testimony admissible under Military Rules of Evidence Rule 404(b).[2]

But the holding in applying Rule 404 was inconsistent with the lower court's application of the law regarding testimony to uncharged crimes prior to the enactment of Rules 413 and 414.

This Court has ruled that the use of ex post facto rules intended to facilitate prosecution violated a Respondent's constitutionally protected rights.[3] Such is the case made to appear here.

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[2] Except when otherwise indicated, Military Rules of Evidence will be hereinafter referenced as Rule.

[3] *Carmell v. Texas.* 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000).

Respondent appealed to the United States Air Force Court of Criminal Appeals and the United States Court of Appeals for the Armed Forces which largely agreed with the reasoning and results of the military court-martial's judgment with one exception requiring administrative correction of an ex post facto collection of forfeitures not included in the sentence of the court martial.

REASONS FOR GRANTING THE WRIT

1. **The Lower Court's Finding that a Substantial Basis Existed to Issue a Search Warrant, Does Not Render the Warrant Valid When the Expert's Testimony Upon Which the Magistrate Relied Lacks Sufficient Indicia of Reliability.**

2. **The Lower Court's Finding that a Substantial Basis to Issue a Search Warrant Automatically Extends to Create a Good Faith Exception for the Executing Officer Who Withheld Important Facts Necessary to Render a Neutral Determination of Probable Cause Somehow Equates to Deliberate Indifference to or Ratification of the Wrongful Act.**

3. **The Lower Court's Admission of Propensity Evidence Impermissibly Burdens the Petitioner's Fundamental Rights of Proof Beyond a Reasonable Doubt and to the Presumption of Innocence and the Admission of Propensity Evidence in this Case Violates the Constitutional Prohibition Against Ex Post Facto Application of the Law.**

This Petition results from a series of decisions during the military court-martial affecting fundamental rights for which the reasoning provided and affirmed smacks of ratification of wrong-doing by government officials.

Moreover, by adopting legislation permitting the blanket introduction of propensity evidence in sex offense crimes, considered at one time unconstitutional by the Court, denies important protections to due process. The purpose of those protections now denied, preserved the fundamental right of the accused to a fair and impartial trial. The new evidentiary rules throw open the door to irrepairable prejudice to the accused's right to a presumption of innocence, as well as the denial of the right, prior to imposing confinement, to proof beyond a reasonable doubt.

Such resolution, particular where, as here, involves more than three hundred years of Anglo-American jurisprudence speaks of an invidious wrong which cannot be viewed as other than subversive to the rights of equal protection and due process of the law long protected under the Constitution.

I. Probable cause to issue a search warrant did not exist at the time because the objects associated with the criminal acts had not been seen for five (5) years and had never been seen in Texas or the residence where the search was conducted.

A search warrant must describe the place to be searched or things to be seized with sufficient particularity, taking account of circumstances of a case

and types of items involved, and must be no broader than the probable cause upon which it is based.[4]

The total circumstances in the instant case, not made known to the issuing magistrate forced him to rely on affidavits which concealed the facts were too stale to justify probable cause[5] in determining to issue the warrant.

These buried facts also reflected that the alleged criminal activity had ceased several years before.[6] Thus the circumstances were broader than the probable cause upon which the warrant was based

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[4] An affidavit describing controlled delivery of child pornography and generally describing proclivities of pedophiles was insufficient to establish probable cause to search defendant's home for anything but the picture sets that arrived as a result of the controlled delivery. *United States v. Webber*, 923 F.2d 1338 (9th Cir. 1990), amended and reh'g denied (1991).

[5] "The cases cited by the Government involved gaps of less than two years between the sighting of evidence and application for a warrant. *See, United States v. Lacy*, 119 F.3d 742 (9th Cir. 1997); *United States v. Harvey*, 2 F.3d 1318 (3rd Cir. 1993." A-493 (*quoting* EFFRON, J. (concurring in part and in the result)).

[6] The criminal activities in the other locations described ceased in 1990 although the warrant was issued in 1995. Vol. I, Record of Trial, 59.

because the place to be searched was not the place where the evidence was last seen.[7]

Probable cause to believe that incriminating evidence was present in a place other than the place to be searched five years earlier, does not mean there is probable cause to believe that incriminating evidence will be present in another state and another place five years later.[8]

The lower court correctly ruled that a magistrate may not held to technical rules of evidence in determining to issue a search warrant even when denied facts important to a neutral and detached probable cause determination.[9] An invalid warrant may issue without fault.[10]

That basic gatekeeping determination, however, is the duty of the military judge during the motion to suppress. *Kuhmo Tire Co. v. Carmichael*, 526 U.S. ___, 143 L. Ed. 2d 238, 249-251 (1998) (*citing Daubert v.*

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[7] *See, Webber, supra* fn. 4

[8] *Id.*

[9] On review the court looks to whether the magistrate had a "substantial basis" under the information presented. *Illinois v.* Gates, 462 U.S. 213,233 (1983); United *States v. Henley*, 53 M.J. 488, 491 (CMA 2000).

[10] *United States v. Simpkins*, 914 F.2d 1054 (8th Cir. 1990).

Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591 (1993)). As recently clarified by the Supreme Court, the basic gatekeeping determination employing *Daubert's* general principals to establish evidentiary reliability applies to all expert testimony.

The judge must determine whether the prosecution showed by clear and convincing evidence that expert was qualified[11] to render the opinion offered and whether those statements offered in support of the application for warrant are relevant and reliable, prior to considering the evidence.[12] That important duty is no more, no less, than a determination as to whether the expert in rendering his or her opinion employed the same level of intellectual rigor that characterizes the practice of an expert in the relevant field, so that the trier of fact will be assisted by the opinion.

However, the evidence in this case fails to show the OSI psychologist considered individualized facts and data necessary to psychiatric protocol to independently develop a diagnosis.[13] Further, her

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[11] *See also, United States v. Lacy*,119 F.3d 742, 745 (9th Cir. 1997) *cert denied*, __ U.S. __, 118 S.Ct. 1571 (1988).

[12] Rule 702.

[13] *See*, H. Kaplan & B. Sadock, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY (6th Ed. 1995). This leading text on psychiatry suggests five propositions for a

diagnosis, categorizing the Petitioner "as 'sexually indiscriminant' or 'try-sexual' (meaning they will try anything plus everything sexual)"[14] is characterized as Situational Child Molesters, [15] not a 'classic pedophile' as subsequently communicated.[16]

It becomes apparent that the psychologist's diagnosis was changed[17] to pave the way for a claim of reliance by the Special Agent upon a isolated excerpt

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psychiatrist to observe in making a diagnosis: (1) an accurate medical and social history must be obtained; (2) the historical data must be obtained not only from the client, but from independent sources also; (3) a thorough physical (including neurological) examination must be conducted; (4) appropriate diagnostic studies - for example, EEG or CT scans or psychological testing - must be undertaken in light of the history and physical examination; and (5) the standard mental status exam cannot be relied on in isolation to assess organic impairment.

[14] App. 17.

[15] Lanning, Kenneth V. Supervisory Special Agent, Behavioral Science Unit, Federal Bureau of Investigation, FBI Academy, Quantico, VA *"Child Molesters: A Behavioral Analysis For Law Enforcement Officers Investigating Cases of Child Sexual Exploitation"* National Center for Missing and Exploited Children: 1992, p. 3.

[16] App. 17.

[17] App. 21.

from a treatise[18] to render his opinion as that of an expert, rather than a hunch which would have precluded issuance of the warrant.[19] The changed diagnosis was necessary for the Special Agent to present a checklist obtained from a source other than a treatise as related to the magistrate so that the accused was now a Preferential Child Molesters or "pedophile" to support his testimony relating probable cause to search.[20]

Thus, not only did the OSI psychologist fail to employ the same level of intellectual rigor that characterizes the practice of a 'profiling' expert in the relevant field, she failed to exercise independent, professional judgment.

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[18] Goldstein, Seth, The Sexual Exploitation of Children.

[19] *See, United States v. Sam*, 46 C.M.R. 124, 129 (C.M.A. 1973).

[20] On cross-examination during the hearing on the Motion to Suppress, it was disclosed that the Special Agent never actually read the treatise cited above but relied upon excerpts of that book from an article that included information about profiling for search warrants. Vol. I, Record of Trial, pp. 63-64.

[21] *See,* Lanning, *supra* fn. 15, which identifies factors that include:

Also, the evidence shows the OSI psychologist failed to consider a sufficient number of factors necessary to "profile" the Petitioner.[21] Furthermore, some scientists and scholars of the law consider it "ludicrous to attempt to draw any conclusions about an individual from general data about a particular group."[22]

A finding of probable cause to search must be based on a determination that certain objects are connected with criminal activity and these objects are

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1. Long-Term and Persistent Pattern of Behavior- sexual abuse in background, Limited social contact as teenagers...
2. Children as Preferred Sexual Objects, Over 25, single, never married; Lives alone or with parents; Limited dating relationships if not married; If married, "special" relationship with spouse; Excessive interest in children; Associates and circle of friends are young; Limited peer relationships; Age and gender preference...
3. Well-Developed Techniques in Obtaining Victims...
4. Sexual Fantasies Focusing on Children...

[22] Quoting Professor Earl Martin, Texas Wesleyan University School of Law, who also states, "Any good scientist would tell you that's highly inappropriate." This statement, commenting on the use of profiles related to testimony to predict future dangerousness in light of the June 5, 2000, decision of this Court in *Saldono v. Texas*, applies equally to the case at hand. *See*, Hansen Mark, *Deadly Race Cards?*, ABA Journal, Chicago, IL: Sept. 2000.

currently located a "particularly" described place. *See, Sgro v. United States*, 287 U.S. 206 (1932) (it is manifest that the proof must be of facts so closely connected to the time of the issue of the warrant as to justify a finding of probable cause at that time); *See also, Rugendarf v. United States*, 376 U.S. 526 (1964); and *Berger v. New York*, 388 U.S. 41 (1967).

The proof of facts to support an issue of probable cause also requires reliable evidence rather than a hunch, as is evidenced in this case, so that the fundamental rights of all persons, including the Petitioner, against unlawful seizure as protected under the Fourth Amendment to the United States Constitution remain inviolate to an unauthorized exercise of government powers.

II. The seized evidence and derivative confession should have been excluded, because the executing OSI Agent acted unreasonably in preparing the affidavit presented to the magistrate by withholding facts important to a neutral and detached determination, precluding admission under the good faith exception.

The lower court then went on to state that even if the warrant was not based upon probable cause, the

evidence could have been admitted under the *Leon* "good faith" exception.[23]

It is acknowledged that the purpose of the exclusionary rule is to deter police misconduct is generally not served by suppression of evidence seized by an officer acting in objective good faith reliance on a facially valid search warrant.[24]

However, the military judge lept from a substantial basis finding to the good faith exception without exercising her duty to ensure the expert testimony supporting the warrant application was reliable.

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[23] Four situations where an officer's reliance on a warrant would be unreasonable as outlined in *Leon* are:

1. the affiant included information in the affidavit that he "knew was false or would have known was false except for his reckless disregard of the truth. And that information misled the issuing judicial officer;
2. the issuing judge abandoned his neutral judicial role;
3. the warrant was based on an affidavit with so few indicia of probable cause that an official belief in its validity would be unreasonable; and
4. the warrant itself was so "facially deficient... that the executing officers could not reasonably rely on its validity. 468 U.S. 897, 923 (1984).

[24] *Id.*

In *Leon*, this Court identified four situations in which an officer's reliance on a warrant would be unreasonable.[25] The court does not state this list is exclusive.

The lower federal circuit courts have in assessing the objective good faith of police officers, looked to the "totality of the circumstances, including any information known to the officers but not presented to the issuing judge." *United States v. Martin*, 833 F.2d 752, 756 (8th Cir. 1987) *cert denied*, ___ U.S. ___, 110 S. Ct. 1793.

Such instances of unreasonable conduct are not limited to allegations that the affiant gave false information or of judicial misconduct on the part of the issuing judge, the reviewing court's inquiry is not limited to these four exceptions but also includes whether "an objectively reasonable officer could have believed the seizure valid." *United States v. White*, 890 F.2d 1413, 1419 (8th Cir. 1989).

By limiting its review as to whether false allegations or judicial misconduct occurred the lower court failed to consider those factors assessing unreasonable conduct found in *Webber*.[26] There, the federal circuit court determined that search warrant must be no broader than the probable cause on which it is based. As applied in this case, it is apparent that

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[25] *Id.*

[26] *Supra* fn. 4.

while the Special Agent did not give false information, he did not voluntarily bring material information before the magistrate showing that the place to be searched was different from the locations described in the affidavit and therefore exceeded the scope of the probable cause.

Another factor pertinent to this case considered by the *Webber* court was the determination of whether a warrant was obtained reasonably. That is whether the Special Agent was operating under a time pressure when he prepared the warrant application. *Id.*

In *Webber*, the government official had complete control over the time of the search and acted entirely unreasonably in preparing the affidavit presented resulting in suppression of the evidence. *Id.*

Likewise, in this case, there was no time pressure causing the production of the flawed affidavits in this case, as the criminal activity upon which the warrant relied had ceased.[27]

Thus, as the government, for reasons similar and even greater than those found by the Ninth Circuit in *Webber*, had no probable cause to believe that incriminating evidence would be present at the Petitioner's Texas residence.

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[27] Vol I, Record of Trial, *supra* fn. 6.

In lieu thereof, the OSI Special Agent relied upon an apparent collaboration[28] with the OSI Investigative Psychologist who by all evidence was willing to revise her diagnosis[29] so that the Special Agent could then include a general checklist in his affidavit application from an article by a "Staff Judge Advocate" on profiling for search warrants rather than the treatise related in the affidavit.[30]

Together, the OSI Special Agent and OSI Psychologist omitted any report to the magistrate of the huge time gap and acted to create the appearance of probable cause to search through generalizations to allow the Special Agent to act on a hunch rather than taking the available time to gather reliable evidence

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[28] *See,* App. 21. Subsequent to the memo issued by the Investigative Psychologist, her opinion changed solely in reliance on the information provided by the Special Agent to opine the accused was a "classic pedophile."

[29] A "classic pedophile" prefers children as sexual objects e.g. a Preferential Child Molester. *See,* Lanning, supra fn. 9. Since the information relied upon by this psychologist was limited to witness statements and those statements indicated the Petitioner participated in heterosexual relationship, this willingness to conform her opinion evidences the absence of any reasonable conduct in the preparation of the affidavits to obtain the "expert warrant."

[30] *See,* Vol I, Record of Trial, 64 and App. 22.

and objective data before seeking the search warrant. *Webber*, supra.

The Government in the person of the OSI Special Agent did not act in good faith in relying on a warrant that sought items which he knew, as evidenced by his orchestrated effort to avoid bringing forward the stale facts,[31] lacked probable cause.

Since the government had complete control over the timing of the search, the Special Agent acted unreasonably in preparing the affidavit presented, the seized evidence that should have been suppressed.

III. The use of propensity evidence impermissibly burdens the Petitioner's fundamental rights of proof beyond a reasonable doubt and to the presumption of innocence and the use of propensity evidence in this case violates the constitutional prohibition against ex post facto application of the laws.

The lower court has rendered a decision raising what will be a recurring issue, conflicts between laws and rules existing at the time of the offense and those existing at the time of the court martial.

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[31] Although the sworn statements of the Henley victims relating events that were alleged to have occurred as children, these statements were only "available" and not presented to the magistrate. App. 22.

The holding also conflicts with the subsequent decision of the United States Supreme Court under similar circumstances, the ex post facto application of an amended evidentiary rule. *Carmell v. Texas.* 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000).

The appellate court ruled that the Military Judge did not err in allowing evidence of other crimes, wrongs or acts, under Rule 404(b), without the same stringent analysis, discussed in detail below, previously applied by the court at the time the alleged offenses occurred.

By stating the testimony to uncharged offenses could have been admitted under Rule 414, the lower court apparently conformed its holding to encompass the ex post fact application of law to offenses occurring before the effective dates of the rules to show propensity were under Fed. R. Evid. 413, or 414.

Prior to the adoption of the Military Rules of Evidence, the reception of 'uncharged misconduct' into evidence was strictly limited. The Government was required to show that there was a nexus in time, place, and circumstances with the charged crime; that the evidence of the accused's participation was plain, clear and conclusive; and, that the probative value of the evidence *far outweighed* the potential potential prejudicial impact." *United States v. Mirandez-Gonzales,* 26 M.J. 411, 413 (C.M.A. 1988) (quoting *United States v. Brooks,* 22 M.J. 441, 444 (C.M.A. 1986)) (emphasis added).

Because this decision departs from historic protections of due process as applied by the Court of Appeals for the Armed Forces,[32] and because Rules 413 and 414 are the very embodiment of a broad talismanic incantation of admissibility, the court has relied upon the reasoning of Saltzburg in rendering its decisions:

> "It is common for the prosecution to use shorthand expressions like modus operandi, common plan or scheme, etc. to account for an offer of evidence of other acts. A trial judge must be certain to make the prosecution state exactly what issue it is trying to prove in order to see whether the evidence is probative,[33] how probative it is, and whether it should be admitted in light of other evidence in the case and the ever present danger of prejudice." S. Saltzburg, L. Schinasi, and D. Schlueter, MILITARY RULES OF EVIDENCE MANUAL 362 (fn. Omitted) (2d ed. 1986), (Editorial Comment to MIL R. EVID. 404(b).

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[32] Hereinafter referenced as "CAAF."

[33] The past parental coercion, as suggested, is merely another shorthand expression for propensity. Further, the testimony was merely propensity evidence at the time it was offered, as a rebuttal to the defense would only become admissible after a claim by the defense of mistaken identity and consent, not as part of the prosecution's case in chief. *U. S. V. Ortiz*, 857 F.2d 900, 902-04 (2d Cir. 1988) *cert. denied*, 489 U.S. 1070 (1989).

The Petitioner respectfully submits that fundamental rights are implicated in the amendment to the rule itself:

First in overturning over 300 years of Anglo-American jurisprudence, the legislature may well have burdened a fundamental right not to be convicted on the basis of propensity evidence.[34]

Alternatively, if freedom from conviction on the basis of propensity is not itself a fundamental right in sex offense cases, use of propensity evidence may nonetheless impermissibly burden the acknowledge fundamental rights of proof beyond a reasonable doubt and the presumption of innocence.[35]

If the rules burden a fundamental right, then strict judicial scrutiny must be applied, and Rules 413 and 414 will survive only if necessary to effectuate a compelling government interest.

Likewise, it is also questionable whether Rules 413 and 414 would meet a test of rational relationship to a legitimate end, if, as stated, the primary reasons are to protect the public by successfully prosecuting sex offenders. The same public interest in successful prosecution is not absent in other offenses.[36]

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[34] Wink, R. Mjr. & Carnes, T. Capt., *New Rules for Sex Offenses: Propensity Evidence No Longer Prohibited?*, The Reporter, Periodical 51-1, Vol. 24, No. 1, p. 8, March, 1997.

[35] *Id.* (quoting *In re Winship*, 90 S. Ct. 1068 (1970).

Since statistics show that federal prosecutions of sexual offenses garner a higher conviction rate than all other classes of violent crime,[37] the rule change affecting the Petitioner's right to due process serve neither a compelling or important interest nor are the means tailored to justify a legitimate end.

Likewise recidivism rates do not clearly demonstrate sex offenders have either a consistently higher or lower recidivism rates than other violent offenders.[38]

In fact, the core assertion by the drafter of these new rules is that a past sexual offense is always highly probative in determining whether an accused

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[36] *Id.*

[37] From June 1991 to June 1992, the federal conviction rate for sex offenses was 84%, significantly higher than that for homicide (75.8%) and assault (64.7%). In fact, the rate is higher thant the rate for convictions in all other violent crimes cases combined (82.9%). *Id.* (citing Sheft, Mark A, *Federal Rules of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 73 (1995) (quoting 1A J. Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW Section 58.2 (1983); *Old Chief v. United States*, __ S. Ct. __ (1997) WL 3230 (7 Jan. 1997) and Duane, James; *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 FED. R. DECISIONS 95, 96 (1994).

[38] Bryden, David P. & Park, Roger C., *Other Crimes Evidence in Sex Offense Cases*, 78 Minn. L. Rev. 529, 572.

committed a charged offense, so that these rules would now resolve what was before the amendment unresolvable swearing matches.[39]

To the point, the CAAF rejected this very basis for admission of propensity evidence in 1988. *See, United States v. Gamble*, 27 M.J. 298 (C.M.A. 1988) (citations omitted).

The lower court's adjustment to accommodate the new evidentiary rule, applying a less stringent of scrutiny in applying Rule 404(b) to avoid prejudice to the rights of the accused is apparent.

The additional issue raised at trial and on appeal, but left without answer by the lower court, was whether the application of Rules 413 and 414 in this case violate the constitutional prohibition against the application of ex post facto rules that alter "the legal rules of evidence and allow less, or different, testimony than the law required at the time of the commission of the offense in order to convict the offender."

Despite the lower court's failure to rule, the Supreme Court has since answered the issue of this type of amendment to an evidentiary rules as violating the ex post facto clause of the constitution. *See Carmell v. Texas*, supra. This Court has held that an

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[39] Wink, R. Mjr., *supra* fn. 17 (citing Cong. Rec. H8991-92, Aug. 21, 1994 (floor Statement of Rep. Susan Molinari *reprinted* in Fed. Crim. Code & R. 244 (West Publishing Co. ed. 1996)).

amendment to a evidentiary rules that alters the rules in a way advantageous only to the State to facilitate an easier conviction, as in this case, violates the constitutional prohibition against "ex post facto" laws).[40]

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[40] The facts in this case show the prior bad acts testimony admitted into evidence occurred on or before 1990 before the adoption of the MILITARY RULES OF EVIDENCE.

CONCLUSION

When set in motion, the government, awesome in its police power, rapidly gains speed and only the law of the land, as enforced by the courts, reins in any unrestrained exercise of the ability to enter homes to make seizures of property in violation of the Fourth Amendment to the United States Constitution.

Likewise, the Fifth Amendment mandating due process of law creates specific duties for a judge and requires that our government officials abide by the law so that the fundamental right to a fair and impartial trial of the accused is ensured.

The inescapable conclusion is that the court below overlooked duties permitting probable cause to search a particular place to reach across state and national boundaries and extending the time frame under which probable cause can continue to exist. The unreasonable extreme permitted in this search was that of five years.

Equally offensive is the denial by the lower court of those protections precluding the application ex post facto law held unconstitutional by this Court.

That being so, the United States Court of Appeals for the Armed Forces was mistaken and our government rather than enforce the law, ratified the trammeling of fundamental rights that should have been protected.

This case, in large measure, reflects the struggle of the lower courts to apply standards of objective reasonableness and reliability to expert testimony as well as the struggle in assessing whether those government officials reach beyond their authority in the exercise of an awesome police power.

More importantly, the circumstances of this case beg for an examination of the Rule of Evidence, adopted by the Military, relating to the use of propensity evidence to determine whether that Rule violates the Constitution of the United States.

As such, this case offers a remarkable opportunity to bring order out of chaos and should, therefore, be accepted for plenary review.

Dated: Wichita Falls, Texas, February 5, 2001.

Respectfully submitted,

Barbara Crampton

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APPENDIX

UNITED STATES, Appellee,

v.

David R. HENLEY, Sr., Captain,
U.S. Air Force, Appellant.

No. 99-0094.
Crim. App. No. 32551

U.S. Court of Appeals for
The Armed Forces

Argued Oct. 20, 1999.

Decided Aug. 31, 2000.

Accused was convicted by general court martial, Linda S. Murnan, J., of oral sodomy, indecent acts, and conduct unbecoming an officer. The United States Air Force Court of Criminal Appeals, 48 M.J. 864, affirmed. Review was granted. The United States Court of Appeals for the Armed Forces, Cox, Senior Judge, held that: (1) victims' testimony about uncharged sexual abuse that occurred outside statute of limitations was admissible as "other crimes, wrongs, or acts;" "2) search warrant for accused's residence was supported by probable cause, and evidence could be admitted under "good faith" exception to the warrant requirement in any event; (3) military judge did not abuse her discretion in denying challenge for cause to

court member based on member's friendship with two individuals who were victims of sexual abuse; (4) guilty finding on conduct unbecoming an officer charge was supported by evidence of accused's possession of nude photographs of children and adolescents; and (5) accused failed to establish ineffective assistance claim.

Affirmed.

Effron, J. filed opinion concurring in part and in the result.

1. **Military Justice** Key 1028

In general court-martial on charges of oral sodomy, indecent acts, and conduct unbecoming an officer, victims' testimony about uncharged sexual abuse that occurred outside the statute of limitations was admissible as "other crimes, wrongs, or acts," and would also be admissible to show accused's similar sexual molestation of his children. Military Rules of Evid., Rules 404(b), 414.

2. **Military Justice** Key 1420

Court of Appeals for the Armed Forces reviews military judge's ruling on the admissibility of evidence under an "abuse of discretion" standard.

3. **Military Justice** Key 1069

Magistrate had substantial basis for concluding that search of accused's home would uncover evidence of wrongdoing, and there was probable cause to issue warrant, based upon information presented to magistrate, including expert testimony and affidavits from accused's son and daughter that accused had shown them pornographic materials and that they had seen the materials since the time they had been used to facilitate the abuse, despite accused's contention that information provided to magistrate was stale and incomplete, absent evidence that the materials had been seen in the last five years.

4. **Military Justice** Key 1419

In determining whether search warrant was properly issued, standard of review applied by Court of Appeals for the Armed Forces is whether the magistrate had substantial evidence in the record to support his decision issuing the warrant.

5. **Military Justice** Key 1046

Even if search warrant for accused's residence was not based upon by probable cause, evidence could be admitted under "good faith" exception to the warrant requirement, where agents believed they were executing a valid warrant and did not act outside of scope of the warrant they possessed.

6. **Military Justice** Key 884.1

In general court-martial on charges of oral sodomy, indecent acts, and conduct unbecoming an officer, involving accused's sexual abuse of his children, military judge did not abuse her discretion in denying challeng for cause to court member based upon actual bias, nor did judge err in refusing to excuse the member because of any "implied bias," premised on member's friendship with two individuals who were victims of sexual abuse. R.C.M. 912 (f)(1)(N).

7. **Military Justice** Key 1420

Military judge's denial of a challenge for cause to a court member is reviewed for an abuse of discretion.

8. **Military Justice** Key 884.1

Question of court member's impartiality is largely concerned with whether the member can judge the case on the evidence and the law, and not on preconceived notions of how the case should be decided, commonly referred to as either "actual" or "implied" biases. R.C.M. 912 (f)(1)(N).

9. **Military Justice** Key 884.1

Whether a court member is actually biased is most often a judgment call for the military judge, based upon answers the member gives to voir dire questions and demeanor and credibility of the member. R.C.M. 912 (f)(1)(N).

10. **Military Justice** Key 781

Conviction on charge of conduct unbecoming an officer was supported by evidence of accused's possession of nude photographs of children and adolescents, contained in his unlocked, government desk; despite accused's contention that he was not placed on notice that this was a criminal offense, rational finder of fact could conclude that possession of such photographs brought disgrace upon an officer of the armed forces. UCMJ, Art. 133, 10 U.S.C.A. § 933.

11. **Military Justice** Key 1421

Court members are presumed to follow the law when properly instructed.

COX, S.J., delivered the opinion of the Court, in which CRAWFORD, C.J., and GIERKE and SULLIVAN, J.J., joined. EFFRON, J., filed an opinion concurring in part and in the result.

For Appellant: *Robert Estrada* (argued); *Lieutenant Colonel Jeanne M. Rueth* and *Captain Tishlyn Taylor* (on brief); *Colonel Douglas H. Kohrt.*

For Appellee: *Captain Mitchel Neurock,* USAFR (argued); *Colonel Anthony P. Dattilo and Lieutenant Colonel Ronald Rodgers* (on brief); *Captain Steven D. Dubriske.*

Senior Judge COX delivered the opinion of the Court.

Appellant was tried by general court-martial comprised of officer members on April 24-26, June 17-21, and June 24, 1996. He was convicted, contrary to his please, of violating Articles 125, oral sodomy (1 specification); 133, conduct unbecoming an officer (1 specification); and 134, indecent acts (2 specifications), Uniform Code of Military Justice, 10 U.S.C. §§ 925, 933 and 934, respectively. Appellant was sentenced to be confined for 6 years and dismissed from the Air Force. The convening authority approved the sentence, and the Court of Criminal Appeals affirmed, granting partial relief in accordance with *United States v. Gorski*, 47 MJ 370 (1997). *See* 48 MJ 864 (1998).

We granted review of the following issues:

I. WHETHER ALLOWING EVIDENCE OF OTHER SEXUAL MISCONDUCT TO SHOW PROPENSITY UNDER FED.R.EVID. 413 OR 414 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE CONSTITUTION.

II. WHETHER THE MILITARY JUDGE ERRED IN ADMITTING EVIDENCE OF UNCHARGED SEXUAL MISCONDUCT UNDER FED. R. EVID. 413 OR 414, EVEN THOUGH APPEALLANT WAS CHARGED PRIOR TO THE EFFECTIVE DATE OF THESE RULES.

III. WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE MOTION TO SUPPRESS EVIDENCE SEIZED FROM APPELLANT'S HOUSE AND THE CONFESSION MADE BY APPELLANT WHEN CONFRONTED WITH THAT EVIDENCE.

IV. WHETHER THE MILITARY JUDGE ERRED IN DENYING THE CHALLENGE FOR CAUSE AGAINST LT. COL. KIM MAURER.

V. WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT A FINDING OF GUILTY OF CONDUCT UNBECOMING AN OFFICER, CHARGE III AND ITS SPECIFICATION.

VI. WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Facts

All of the offenses for which appellant stands convicted arose out of appellant's sexual abuse of his natural children -one son and one daughter—which started when his son was approximately 4 or 5 years old and his daughter was 11 or 12 years old. The abuse continued until each was about 16 or 17 years of age.

During the course of the trial, there was questioning about prior, uncharged sexual abuse offenses that occurred outside of the statute of limitations. The testimony was offered under more

than one theory. The Government originally sought to offer it as either evidence of similar sexual offenses under Fed.R.Evid. 413 or as evidence of child molestation under Fed.R.Evid. 414.* The military judge ruled that this evidence was admissible under Rule 414, as well as under Mil.R.Evid. 404(b), Manual for Courts-Martial, United States (1995 ed.).

Discussion

I. Evidence of Prior Misconduct

[1] Issues I and II ask whether Rules 413 and 414 permit the admission of testimony of any of the victims about sexual abuse that occurred outside the statute of limitations. The military judge overruled the defense objection to the evidence, finding it to be admissible. He stated:

> I find that the prior acts of sexual abuse contained in the statements of [J] and [D] are admissible under Military Rule of Evidence 414 [sic]. Further, I find that this evidence would also be admissible under Military Rule of Evidence 404(b) to prove scheme, plan, motive, and preparation.

As he did below, appellant attacks here the admission of the evidence under Rule 414 on several

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* *See United States v. Wright*, 53 MJ 476, 478 (2000). Rules 413 and 414 became applicable to the military at the same time.

grounds, including that Rule 414 is unconstitutional, at least as it pertains to appellant The Court of Criminal Appeals resolved the issue on the basis of Mil.R.Evid. 404(b). 48 MJ at 870–71. That court reasoned that there was no need to address the Rule 414 question.

[2] We review the military judge's ruling on the admissibility of evidence under an "abuse of discretion" standard. *United States v. Acton*, 38 MJ 330, 332 (CMA 1993). We agree with the approach taken by the Court of Criminal Appeals. The testimony of the victims regarding uncharged sexual abuse was admissible as "other crimes, wrongs, or acts" under Mil.R.Evid. 404(b).

In any event, we have recently resolved the questions raised by appellant concerning the applicability and scope of Mil.R.Evid. 413 and 414. *See United States v. Wright*, 53 MJ 476 (2000). Applying that rationale to the facts of this case, we would readily conclude that this evidence was admissible to show appellant's similar sexual molestation of his children.

II. Admissibility of Seized Evidence and Derivative Confession

[3] The sexually explicit material introduced against appellant was seized as a result of a search warrant issued by a Texas magistrate. Following the seizure, appellant made some admissions (the confession), which were used against him at trial. He now contends that the magistrate's warrant must fail because it was not based upon probable cause. He further contends

that his confession must also be suppressed as it resulted from the illegal search warrant.

At trial and on appeal, the defense has consistently attacked the warrant on the basis that the information provided to the magistrate was stale and incomplete. The information relied upon by the magistrate was expert testimony and affidavits from appellant's son and daughter that, over the course of several years, appellant had shown them pornographic materials in the form of videotapes and magazines in order to arouse them. Moreover, both children alleged that they had seen the materials since the time they had been used to facilitate the abuse.

At trial, appellant argued that the Texas search warrant was fatally flawed because the magistrate had been denied a critical fact. There was no evidence that the pornographic materials being sought by the warrant had been seen in the 5 years prior to the execution of the victims' affidavits regarding the materials. Furthermore, there was no evidence that the materials being sought had ever been seen in the Texas home of appellant. Under these circumstances, appellant argues the warrant was not properly based upon probable cause and must be held invalid.

Pretrial, the military judge considered whether the warrant was properly issued. After evaluating the evidence, the judge decided as follows:

> The defense motion, simply stated, is based upon the position that the information

> provided by the children was stale. Staleness is a factor appropriate for a magistrate in evaluating probable cause. However, it is only one factor to be evaluated. In light of all of the information contained in the affidavit provided to Judge Cate, and all of the information provided to Judge Cate, including the information in the treatise relied upon and related to Judge Cate in the affidavit, the sworn statements of [J] and [D], and even without the statement provided by Lieutenant Colonel Slicner, probable cause existed to believe that some of the sexually explicit materials allegedly used by the accused in performing the various sexual activities alleged, would be found in the residence in Live Oak, Texas.

[4] Our standard of review of this issue is whether the magistrate had substantial evidence in the record to support his decision issuing the search warrant. *See United States v. Monroe*, 52 MJ 326, 331 (2000).

First, based upon the information presented to the magistrate, we agree with the military judge that the magistrate "had a substantial basis for concluding that a search [of appellant's home] would uncover evidence of wrongdoing." Perhaps the magistrate would not have been persuaded to issue the warrant had he known that there was no evidence the materials had been seen in the last 5 years. However, we are not free to speculate but must review the record presented to the magistrate.

We hold the military judge did not abuse her discretion. First, under the totality of the circumstances presented to the magistrate, as set forth by the military judge, there was probable cause to issue the warrant. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). We agree, therefore, with the Court of Criminal Appeals that the military judge did not err by denying the motion to suppress the fruits of the search or the admissions made by appellant subsequent to the search.

[5] However, even if the warrant was not based upon probable cause, the evidence could be admitted under the "good faith" exception to the warrant requirement. *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405,82 L.Ed.2d 677 (1984); *United States v. Lopez*, 35 MJ 35 (OMA 1992). The agents believed they were executing a valid warrant and did not act outside of the scope of the warrant they possessed. The items seized were encompassed by the description in the warrant. Thus, the agents reasonably believed these items were seized under the authority of a lawfully issued search warrant. Therefore, this evidence was properly admit-

III. *Denial of Challenge for Cause*

[6] Lt. Col. Maurer was asked probing questions during voir dire about his friendship with two individuals who were victims of sexual abuse. Neither friend was abused as a child. Lt. Col. Maurer stated that he could disregard any knowledge of his friends'

situations and that he could judge whether appellant was guilty solely on the evidence presented. The defense counsel also challenged Lt. Col. Maurer because he stated that he believed someone with an extensive collection of pornography probably had a "fixation or something of that nature." He also stated, however, that he would not convict anyone of a sexual offense solely because they possessed large quantities of pornography. The military judge denied the defense challenge for cause.

[7] We review the military judge's denial of a challenge for cause for an abuse of discretion. *United States v. Schlamer,* 52 MJ 80, 93 (1999).

[8,9] RCM 912(f)(1)(N), Manual, supra, requires a military judge to excuse a member "whenever it appears that the member . . . ... [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." The question of impartiality is largely concerned with whether the member can judge the case on the evidence and the law, and not on preconceived notions of how the case should be decided-commonly referred to as either "actual" or "implied" biases. United States v. Napoleon, 46 MJ 279, 283 (1997). Whether a member is actually biased is most often a judgment call for the military judge, based upon the answers the member gives to voir dire questions and the demeanor and credibility of the member. *Schlamer, supra,* citing *United States v. Napoleon, supra, United States v. Jefferson* 44 MJ 312, 321 (1996).

We see nothing in the record before us that causes us to conclude that the military judge abused her discretion in denying the challenge of this member based upon his actual bias. Furthermore, we are satisfied that the judge did not err in refusing to excuse the member because of any 'implied bias." There is a substantial difference between a court member who has "friends" who weie victims or who may know a victim of a crime and a member who may have had "family" as a victim of a crime, *Compare United States v. Jefferson, supra, United States v. White,* 36 MJ 284 (CMA 1993), and United *States v. Daulton,* 45 MJ 212 (1996).

IV. *Legal Sufficiency of the Evidence*

[10] The conduct unbecoming an officer charge was based upon appellant's possession of sexually explicit material depicting male and female genitalia and magazines with pictures of naked children and adolescents, in his unlocked, government desk. Appellant argued at trial that he was not placed on notice that this was a criminal offense. Here, on appeal, appellant is arguing that these facts are legally insufficient to support the charge of conduct unbecoming an officer.

We disagree It is without question that, under the circumstances of this case, a rational finder of fact could conclude that possession of the nude photographs of children and adolescents brings disgrace upon an officer of the armed forces. *United*

States v. Hartwig, 39 MJ 125 (CMA 1994); *United States v. Maxwell*, 45 MJ 406 (1996).

[11] The evidence in this case was presented to the members with proper instructions. Members are presumed to follow the law when properly instructed. The evidence was legally sufficient to support the charge of conduct unbecoming. *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

V. *Ineffective Assistance of Counsel*

Appellant contends that his trial defense counsel were deficient in the following particulars:

(1) They failed to push for a trial date before the effective date of Rules 413 and 414, and did not challenge their effective date at trial.

(2) They failed to call a potential alibi witness, Chris Hannon, who would allegedly testify that he was around appellant's son one summer and that his son did not register a claim of sexual abuse at this time.

(3) They did not offer pictures or measurements of a glove box in a van to show why pornographic magazines could not have been kept in this compartment. This testimony would have allegedly contradicted appellant's son's testimony that these magazines were used from this location on one occasion.

(4) They prevented appellant from giving the unsworn statement that appellant wanted to give during sentencing.

After a careful review of the record, we conclude that the Court of Criminal Appeals correctly evaluated appellant's claims. 48 M.J at 872–73. Appellant has offered nothing more to show how counsels' performance was deficient. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Nor has he raised any unresolved questions of fact concerning his claim, which would require further proceedings. *United States v. Ginn*, 47 MJ 236 (1997).

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

EFFRON, Judge (concurring in part and in the result):

I agree with the majority opinion, except with respect to Issue III. I concur in the result in Issue III, and with the majority's reliance on the good faith exception. I disagree, however, with that portion of the majority opinion that would suggest the search warrant could be sustained upon a finding of probable cause.

In the present case, the pertinent information was provided by the victims. They had not seen the material sought under the warrant during the previous 5 years, and they had never seen the material at the residence that was the subject of the search. Under

these circumstances, the 5–year time lapse stretches the boundaries of reasonableness too far.

The statement provided by the investigative psychologist, profiling appellant as "sexually indiscriminate" of "try-sexual, "[1] does not "bridge the gap" between the sighting and the search to save the stale information. Although profiles may be used as a factor to establish probable cause, *see United States v. Rugh*, 968 F.2d 750 (8th Cir.1992), the cases cited by the Government involved gaps of less than 2 years between the sighting of evidence and application for a warrant. *See, United States v. Lacy*, 119 F.3d 742 (9th Cir.1997); *United States v. Harvey*, 2 F.3d 1318 (3rd (3rd Cir.1993). In my view, these cases represent the outer boundaries of the use of profile evidence to "bridge the gap" and they do not warrant a finding of probable cause in the present case.

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[1] The psychologist's affidavit, included with the application for the search warrant, categorized appellant as " 'sexually indiscriminant' or 'try-sexual' (meaning they will try anothing plus everything sexual)."

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES
V.
Captain DAVID R. HENLEY, SR., 466-96-2415

United States Air Force

ACM 32551

17 August 1998

__M.J.__

Sentence adjudged 24 June 1996 by GCM convened at Randolph Air Force Base, Texas. Military Judge: Linda S. Murmane

Approved sentence: Dismissal and confinement for 6 years.

Appellate Counsel for Appellant: Mr. Robert Estrada, Colonel Douglas H. Kohrt. Lieutenant Colonel Kim L. Sheffield. and Captain Tishlyn E. Taylor.

Appellate Counsel for the United States: Colonel Brenda L. Hollis, Lieutenant Colonel Michael J. Breslin, Major Allen G. Erickson, and Captain Steven D. Dubriske.

Before
SNYDER. YOUNG. and SENANDER
Appellate Military Judges

OPINION OF THE COURT

SNYDER. Senior Judge:

We hold in this case as follows: 1) a magistrate, or authorizing official may, when presented an adequate supporting basis, consider opinion evidence when determining whether probable cause to search exists; 2) when evidence of other crimes or acts is admitted at trial under both MIL. R. EVID. (Rule) 404(b) and 414, a determination at the appellate level that the evidence was properly admitted under Rule 404(b) moots any issue regarding Rule 414; and, 3) questions by appellate defense counsel as to 'why' trial defense counsel did or did not do certain things before and during the trial, without more, do not raise any cognizable issue regarding ineffective assistance of counsel.

I. BACKGROUND

Tried by general court-martial, appellant was convicted, contrary to his pleas. of consensual oral sodomy, two instances of committing indecent acts, and conduct unbecoming an officer and a gentleman. Articles 125, 134. and 133, L!CMJ. 10 U.S.C. ~ 925, 934. and 933. He was sentenced to a dismissal and confinement for 6 years, which the convening authority approved. Appellant submits 11 assignments

of error, only one of which has merit, and only four of which merit extended discussion. We grant partial relief but otherwise affirm.

The charges appellant was convicted of arose from repeated instances of him molesting his son and daughter between 1976 and 1995. Due to the statute of limitations, however, he was charged only with those instances which occurred between September 20, 1990, and May 1995. See Article 43(b)(1), UCMJ, 10 U.S.C. § 843(b)(1). The first issue we consider is appellant's assertion that the military judge erred in not granting his motion to suppress the results of a search of his residence.

II. FACTS

The military judge made extensive findings of fact on this issue. They are as follows:

First, on or about 24 April 1995, [JLH] and (DRH] were interviewed by the Air Force Office of Special Investigations. They completed signed, sworn statements in which they alleged a long history of sexual abuse perpetuated upon them by the accused.

The statement of [DRH] related the accused watched pornographic movies with him on Sunday mornings; made video tapes of (DRH] involved in sexual conduct with the accused: charged [the accused] showed to (DRH] "dirty magazines" and showed him homemade video tapes of sexual conduct occurring between the accused and his wife.

In the statement of [DRHJ, he indicated that often this type of behavior occurred as a method used by the accused in initiating sexual acts with [DRH].

Office of Special Investigations Detachment Superintendent. Special Agent [B] telephonically contacted Lieutenant Colonel Nancy A. Slicner, an Investigative Psychologist assigned to AFOSI. She reviewed the case information and provided a memo indicating an opinion that the subject described was "sexually indiscriminate" or [a] "try-sexual" (meaning they will try anything plus everything sexual]. She further opined chat there was an 'exceptional strong likelihood" that such an individual would keep articles of past sexual exploitations.

Three. Lieutenant Colonel Slicner told Special Agent [B] that, based on the information she had been provided, it was her opinion the accused was a "classic pedophile." Special Agent [B] then reviewed information from a treatise on pedophilia titled *The Sexual Exploitation of Children* by Seth Goldstein. That information included certain common characteristics of persons who, among other things, molest children. Those criteria include collecting sexually explicit materials and rarely, if ever, disposing of such materials.

Fourth. Special Agent [B] took the statements of [JLH] and (DRHJ, the statement of Dr Nancy Slicner, and the information obtained from the Goldstein treatise to Detective [S] of Live Oak [Texas] Police

Department. He briefed Officer [S] on the investigation and allowed her to review and inspect the information he had regarding the case. Agent [B] prepared an affidavit for search warrant and Officer [S], accompanied by Agent [B], appeared before Judge R. N. Cate [a magistrate of Bexar County, Texas] Officer [S] and Agent [B] were sworn by Judge Cate, related the information substantially as it is contained in [the affidavit]. It provided Judge Cate with the statements of [JLHJ and [DRH], the statement from Lieutenant Colonel Slicner, and a summary of the information from the Goldstein treatise. Judge Cate took approximately one hour to review the information provided to him prior to him issuing the warrant.

Five, none of the information provided to Judge Cate specifically told him the materials had last been seen by [JLH] and [DRH] in 1990 in a location other than the accused's residence in Live Oak, Texas.

Six, Judge Cate did have available for his review, the 24 April '95 sworn statements of the Henley children, which allege sexual abuse occurred in California, Arkansas, Germany, Abilene. Texas. and Warrensburg, Missouri. Additionally, the statements clearly indicated the time frame of the alleged abuse.

Seven. [JLH] indicated in her 24 April 95 statement that she presently resided in the premises which the affidavit requested permission to search.

Eight. on 25 April '95, the Live Oak Police Department did not have an open case involving the

accused, nor was any case ever opened by the Live Oak Police Department on [the accused] arising from this investigation.

Nine, the warrant obtained from Judge Cate was executed by Officer [S] with the assistance of the Live Oak Police Department and the [AFOSI] and resulted in the seizure of [over 1000 video tapes; video recording equipment, including a camcorder camera; and, numerous sexually explicit magazines, some of which depicted nude children and homosexual acts, were seized].

After making the above findings, the military judge ruled that Judge Cate had a substantial basis for finding probable cause to search and denied the motion to suppress. We find no error in the ruling.

III. DISCUSSION

A. *Probable Cause to Search*

A military judge's ruling on the admission or exclusion of evidence, including rulings on motions to suppress, are reviewed for an abuse of discretion. *United Stares v. Ayala.* 43 M.J. 296 (1995); *United States v. Agosto,* 43 M.J. 745, 748 (A.F. Ct. Crim. App. 1995). As search issues generally are mixed questions of fact and law, we review a military judge's findings of fact under a clearly erroneous standard, and we review the military judge's conclusions of law under a de novo standard of review. A military judge abuses his or her discretion on a, motion to suppress only if the factual findings are clearly erroneous or the law is applied

erroneously. *Ayala*, 43 M.J. at 298; *United States v. Burns*. 21 MJ. 140, 144 (C.M.A. 1985). Finding the military judge's findings in full accord with the evidence of record, we adopt them as our own. Article 66(c), UCMJ. 10 U.S.C. § 866(c)

Both at trial and before this Court appellant's primary assertion is that the information on which the magistrate relied was too stale to constitute the probable cause necessary to support issuance of the warrant. In support of this position, appellant argues the fact that that DRH's and JLH's statements omitted the fact that they last saw the referenced sexually explicit video tapes and other materials in 1990 in a location other than appellant's Live Oak, Texas, residence. Further, appellant avers Dr. Slicner's 'profile' of appellant was insufficient to fill this gap. Although appellant is relying, in part on information which was not included in SAB's and Detective S' affidavit, trial defense counsel specifically stated that he was not asserting misrepresentation or a reckless disregard for the truth by SA B and Detective S. Therefore, that issue is not before this Court.

Probable cause exists when there is sufficient information to provide the authorizing official a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. ML. R. EVID. 315(0(2): *United States v. Nix*. 35 M.J. 283 (C.M.A. 1992). Whether probable cause exists for a magistrate to issue a search warrant is determined by the totality of the circumstances presented to the magistrate. *Illinois v. Gates*, 462 LLS.

213, 233 (I983). In *Gates*, the Court emphasized the fact that the law does not demand that a magistrate make technical legal determinations when deciding whether to issue a warrant. Instead, only a practical, common sense assessment is required because the central question is whether there is probable cause, not whether there is proof beyond a reasonable doubt. *See Gates*, 462 U.S. at 231 and cases cited therein. Searches authorized by magistrates are preferable to searches conducted under other bases. Consequently, a magistrate's determination that probable cause existed is entitled to great deference. See *United States v. Leon*, 468 U.S. 897, 914 (1984); *United States v. Hester*, 47 M.J. 461,466 (1998) (Gierke, J., concurring in part and in the result); *United States v. Lopez*,35 M.J. 35, 49.50 (C.M.A. 1992) (Wiss, J., concurring in the result). In light of this deference, this Court's de nova review is confined to whether the military judge was correct in ruling that Judge Cate had a substantial basis for finding probable cause existed to search appellant's residence. *United Stares v. Figueroa*, 35 M.J. 54, 56 (C.M.A. 1992).

Timeliness of the information relied on is a vital part of the probable cause decision matrix. *Lopez*, 35 M.J. at 38. As stated, *ante*, appellant's primary complaints are: the information presented by DRH and JLH was too stale for the magistrate to rely on. and the magistrate improperly relied on Dr. Slicner's opinion and the information provided from Goldstein's treatise to overcome the alleged staleness of the information provided. However, although sufficient time may have elapsed in a given situation whereby the most reasonable inference is that the contraband or evidence

is no longer at the place to be searched, the lapse of a substantial period of time, standing alone between the event or events relied on and the search is not determinative, Id. The factors a magistrate, or other authorizing official, must consider are: the location to be searched; the type of crime being investigated; the nature of the article or articles to be seized: how long the criminal activity has been continuing; and, the relationship, if any, of all these items to each other. Id at 38-9 and cases cited therein; accord *United States v. Lacy*, 119 F3d 742, 745 (9th Cir. 1997). *cert. denied.* ___ U.S. . 118 S. Ct. 1571 (1998): *United States v. Harvey.* 2 F,3d 1318(3dCir. 1993); *United States v. Peden*, 891 F.2d 514. 518-19 (5thCIr. 1989).

As regards Judge Caters consideration of Dr. Slicner's memorandum and the information from Goldstein's treatise, neither appellate government nor civilian appellate defense counsel have invited our attention to military precedent addressing the use of expert. or other informed opinions by a magistrate. This need not detain us, however. for as appellate government counsel's brief reflects, the federal circuit courts of appeals have considered the issue and found no impropriety in a magistrate relying, in part. on opinion evidence. *See Lacy.* 119 F.3d at 745: *Harvey*, 2 F..3d at 1320: *Peden.* 891 F.2d at 518. We discern no reason to reject their reasoning as it may apply to search issues before trials by courts-martial.

The general operative concept is that, as long as there is an underlying factual basis for any opinion tendered by the requesting investigator, the magistrate

(or other authorizing official) may use it as part of his/her probable cause determination. In the instant case, this means that there must have been some evidence in either the affidavit or other information submitted to Judge Cate which demonstrated appellant is a pedophile, and that pedophiles are unlikely to dispose of certain possessions. *Lacy*, 119 F.3d at 746 n.6; *Harvey*, 2 F.3d at 1320.

Dr. Slicner reviewed DRH's and JLH's statements, thereby providing her a factual basis for her assessment and opinion. Similarly, SA B and Detective S consulted Goldstein after obtaining and reading DRH's and JLH's statements. Further, Judge Cate thoroughly reviewed the sworn statements of DRH and JLH. DRH's statement contained the sordid details of appellant's constant molestation of him during the prior 14 years, and JLH s statement recounted appellant's sexual abuse of her. With this factual basis, it was entirely permissible for Judge Cate to entertain Dr. Slicner's professional opinion and the excerpts from Goldstein's treatise, to conclude that, appellant probably is a pedophile, and that he probably still possessed the video tapes, sexually explicit magazines, and the sexual implements DRH referenced in his statement. *Lacy*, 119 F.3d at 745 (with evidence that defendant is a pedophile, customs agent could rely on his training and experience to opine to magistrate that defendant still possessed child pornography 10 months later); *Peden*, 891 F.2d at 519 (with evidence that defendant is a pedophile. agent could opine to magistrate that such persons are unlikely to dispose of materials sought); accord *United*

States v. Koelling, 992 F.2d 817. 8 19-20 (8th Cir. 1993). This was not an instance of a magistrate relying on a 'policeman's hunch" to issue a search warrant, which hornbook search and seizure law teaches is insufficient. See *United States v Sam.* 46 C.M.R. 124, 129 (C.M.A. 1973). Instead, there was a credible factual foundation underlying the opinions rendered.

In light of the underlying factual basis present in the instant case, we eschew the parties' use of' the term "profile" as it related to appellant and Judge Cate's determination Accordingly, we hold that, when a magistrate or other official is presented sufficient information, via affidavit or orally by the requesting investigator, to factually connect the suspect with the criminal activity or evidence in question. there is no impropriety in the magistrate considering the informed, relevant opinion of either the investigator or other person or expert when determining whether probable cause exists to issue a search warrant or authorization. When an investigator renders an opinion, the investigator must inform the magistrate of the basis of the investigator's qualification to render the opinion (training, experience, etc.). *See Lacy*, 119 F.3d at 745. Obviously, if an expert's opinion is presented to a magistrate, it must be demonstrated that the expert is familiar with the underlying information which connects the suspect with the opinion.

Given these factors, Judge Cate clearly had a substantial basis for determining that appellant probably still possessed the items referenced in DJH's

statement. Therefore, this assignment of error is without merit.

B. *Evidence of Other Wrongs or Acts*

As stated in Part I, *ante*, the military judge admitted, over trial defense counsel's objection, evidence of appellant's acts of molestation of DRH and JLH which fell outside the statute of limitations. The prosecution proffered the evidence under both Rules 404(b) and 414, and the military judge entered findings and conducted the Rule 403 balancing test before admitting the evidence under both rules. As a result, civilian appellate defense counsel has submitted three assignments of error which attack the propriety of admitting the evidence under Rule 414, including an averment that Rule 414 is unconstitutional. Civilian appellate defense counsel's brief is silent on the propriety of admitting the evidence under Rule 404(b). In light of the basis for the military judge's rulings at trial, we need not address counsel's assertions regarding Rule 414 to conclude the evidence was properly admitted.

Frequently, appellate courts must apply a hierarchy of sources of law to resolve various issues. The most frequent hierarchy referenced is: the Constitution of the United Stares: federal statutes, including the UCMJ: executive orders, including the MANUAL FOR COURTS MARTIAL and MILITARY RULES OF EVIDENCE; ET AL. *See Lopez*, 35 M.J. at 39. The primary rule of application is that the highest source of authority is paramount unless a lower source accords greater

rights or protection for the individual or accused. *Id; accord United States v. Davis*, 47 M.J. 484 (1998). This principle also applies when applying a particular source; in the instant case, the MILITARY RULES OF EVIDENCE.

Without going into substantial detail, suffice it to say that Rule 414 was promulgated specifically to allow the admission of evidence of prior instances of child molestation by an accused. The provisions of Rule 414, and its limited legislative history, reflect that Congress intended for Rule 414 to have a broader reach than Rule 404(b). *United States v. Hughes*. ___ M.J.. ___ ACM 32359 (A.F. Ct Crim. App. 1998): *Id.* at ___ (Snyder. S.J.. concurring in part and in the result). One of the consequences of this fact is that the relevancy threshold for Rule 414 is lower than that for the other rules, and the balancing test of Rule 403 is less restrictive for evidence admitted under Rule 414 than for evidence submitted under Rule 404(b). *Id* at ___; *see also. e.g., United States v LeCompte*. 131 F.3d 767. 769 (8thCir. 1997). Therefore, if the evidence in question was properly admitted under Rule 404(b), any question of admissibility under Rule 414 is rendered moot. We now consider the military judge's ruling that the evidence was admissible under Rule 404(b).

Our standard of review for this issue is abuse of discretion. *United States v. Acton*, 38 M.J. 330 (C.M.A. 1993); *United States v. Mukes*, 18 M.J. 358 (C.M.A. 1984). Rule 404(b) provides, in part. as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident....

There now is a well established three-part test for determining admissibility, which is:

1. Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs, or acts?

2. What "fact of consequence" is made more or "less probable" by the existence of this evidence?

3. Is the 'probative value,' substantially outweighed by the danger of unfair prejudice"?

United States v. *Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989) (citations omitted). The first part of this test presents a very low threshhold. Simply, the military judge has only to find that the members *could* reasonably find, by a preponderance of the evidence, that appellant committed the crimes in question. MIL. R. EVID 104(b); *Acton*. 38 M.J. at 333.

This prong was more than satisfied by the

testimony of both DRH and JLH and that testimony of SA B describing appellant's oral admissions. The second part of the test addresses relevance. See Rules 401 and 402. Appellant was charged with the forcible sodomy of DRH via the constructive force of parental coercion which cancelled DRH's ability to resist appellant's actions. The prosecution informed the military judge that the evidence was offered to prove that appellant had conditioned DRH over the years to submit to his sexual demands and that DRH had come to believe it would be useless to resist appellant. See *United States v. Palmer*. 33 M.J. 7 (C.M.A. 1991). Further, after additional developments during the trial, the prosecution also asserted, and the military judge concurred, that the evidence was admissible to prove appellant's "identity' as the perpetrator of the indecent acts charged in the specifications involving JLH. She testified she was playing a computer game when she felt a penis run across the back of her neck. Although she did not turn around when it occurred, she believed it was appellant because of his prior acts of abuse of her, and she ignored the act so appellant would go away. During cross-examination of JLH, trial defense counsel suggested the prospect that it was DRH, not the appellant, who touched the back of her neck with his penis, as well as being the one who stood next to her bed in her darkened bedroom and masturbated.

First, we observe that the evidence clearly was offered for a purpose other than to show appellant's propensity to commit the offenses charged. This Court previously has held that similar crimes which fall outside the statute of limitations may be admitted on

the issue of consent where parental coercion is in issue. *United States v. Hansen*. 36 M.J. 599. 603-4 (A.F.C.M.R. 1992). Moreover, given the defense's theory of mistaken identity, appellant's crimes outside the statute of limitations plainly were probative on that issue as well as the issue of consent. and satisfied the second part of the Reynolds test. *Acton*. 38 M.J. at 333. The final question is whether the danger of unfair prejudice substantially outweighed whatever probative value the evidence had, which is the balancing test of Rule 403.

Even evidence otherwise admissible must be excluded if its potential for unfair prejudice substantially outweighs the probative value of the evidence. MIL. R. EVID. 403: *United States v. Castillo*, 29 M.J. 145. 151 (C.M.A. 1989). The military judge performed this test as required and found the probative value was not outweighed by the potential for unfair prejudice. While the military judge did not detail the factors of her balancing test, we do not consider that fatal in light-of the significant probative value of the evidence.

Therefore, we conclude the military judge did not abuse her considerable discretion in admitting the evidence. Even if she committed error by doing so, it was harmless. See Article 59(a), UCMJ. The military judge provided the members a limiting instruction on the proper use of the evidence. It is evident from the findings that the members followed the instructions and confined the evidence to its proper role. Appellant was found not guilty of forcible sodomy, two of the

indecent acts with DRH and the charged act of rubbing his penis across the back of JLH's neck.

In light of the evidence being properly admitted under Rule 404(b), we need not address the Rule 414 issues asserted by civilian appellate defense counsel.

IV. FACTUAL SUFFTCIENCY

Appellant asserts that the evidence is factually insufficient to support the findings of guilty. We disagree. To find a conviction factually sufficient, we must determine that after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the accused's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (CM.A. 1987).

To support this averment, appellant refers to DRH's and JLH's admitted prior inconsistent statements and their inability to provide firm dates for the instances of appellant's abuse of them. Considering the lengthy time period involved, Like the members, we do not find this factor remarkable. Further, there is the 'flatter of appellant's admissions, especially the one made in the presence of his supervisor, Lieutenant Colonel (Lt. Col.) L, when he escorted appellant to his home to retrieve personal items before departing for .a mental examination. Lt. Col. L testified that, before departing his home, appellant told his wife that she would be hearing some bad things about him and they were true. Contrary to his approach on the admissions appellant made to SA

B, trial defense counsel did not suggest that the admission in Lt. Col. L's presence related to the acts outside the statute of limitations. Instead, he relied on Mrs. H's testimony that appellant said no more than she would hear some bad things and for her to go to her parents home in Fort Worth. We find SA B, Lt. Col. L, DRH, and JLH, more credible. We too are convinced, beyond reasonable doubt, of appellant's guilt. Article 66(c), UCMJ. 10 U.S.C. § 866(c).

V. EX POSTFACTO

Appellate government counsel properly concede that the amendment of Article 57(a). UCMJ, and the enactment of Article 58b, UCMJ, as applied to appellant, violated the Ex Post Facto Clause of the Constitution. *United States v. Gorskj,* 47 M.J. 370 (1997). We will direct corrective action in our decreyal.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

VII.

Civilian appellate defense counsel avers that appellant "arguably did not receive effective assistance of counsel." and requests a post-trial fact-finding hearing. *See United States v. DuBav.* 37 C.M.R. 411 (C.M.A. 1967). Whether counsel's performance is ineffective is measured by the Supreme Court's standards promulgated in *Strickland v.Washington,* 466 U.S. 668 (1984), and its ever growing progeny. The first and foremost teaching of *Strickland* is that counsel's competency is presumed and appellant has the substantial burden of rebutting that presumption. When testing for whether an appellant has carried this

burden, this Court resolves three basic questions, which are:

> (1) are appellant's allegations true and, if so, is there a reasonable explanation for counsel's actions in the defense of the case? (2) If true. did the level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers? and (3) If ineffective assistance of counsel is found to exist, is there a reasonable probability that absent the errors, the factfinder would have had a reasonable doubt regarding guilt?

United States v. Polk. 32 M.J. 150, 153 (C.M.A. 1991); accord *United States v. Lonetree,* 35 M.J. 396.412-13 (C.M.A. 1992); *United States v. Scott,* 24 M.J.. 186, 188 (C.M.A. 1987).

In the instant case, neither appellant nor his civilian appellate defense counsel assert any specific failing, shortcoming, or misrepresentation by trial defense counsel. Nonetheless, civilian appellate defense counsel requests a post-trial hearing to answer a series of questions which strike this Court as musings rather than specific assertions of deficient performance. As this and our superior Court have held previously, trial defense counsel's tactics will not be second-guessed on appeal. *United States v. Morgan.* 37 M.J.. 407 C.M.A. 1993): *United States v. Stephenson,* 33 M.J. 79 (C.M.A. 1991); *United States v Rivas,.* 3 M.J. 282, 289 (C.M.A. 1977).

Based on appellant's offerings, we hold that appellant has not even keyed the *Polk* test. Questions such as: why wasn't Lt. Col. M challenged peremptorily? Why didn't trial defense counsel "push the government to start appellant's trial before the effective date of MIL. R. EVID. 414?"; and, why weren't photographs taken of the "glove box in the van?.' strike this Court as no more than an indication of how appellate defense counsel, with the not insubstantial advantage of hindsight, may have tried the case. Questions such as chose set forth do not raise any factual issue for a post-trial hearing to address, *see United States v. Ginn.* 47 M.J. 236 (1997), being as they address the realm of tactical decisions.

Therefore, in the absence of a colorable claim of inadequate preparation by trial defense counsel or appellant's non-acquiescence in trial defense counsel's tactics, the issue of ineffectiveness simply is not raised. *See United States v. Duffey,* 37 M.J. 511. 516 (A.F.C.M.R. 1993).

VIII. SENTENCE SEVERITY

Appellant asserts that his sentence is inappropriately severe. We disagree. This Court's statutory mandate directs that we approve only so much of a sentence as round to be correct and appropriate. Article 66(c), UCMJ. 10 U.S.C. § 866(c). Performance or this function, however, does not entail granting clemency. *United States v. Healy,* 26 M.J. 394, 395-96 (C.M.A. 1988). The primary manner of discharging this Court's statutory duty on sentence is

to give individualized consideration to appellant, including the nature and seriousness of the offenses and the character of appellant's service. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982). Applying these factors, we do not find appellant's sentence to be inappropriately severe. Further, the record convinces us that the members sentenced appellant solely for the offenses of which he was convicted. Article 66(c), UCMJ, 10 U.S.C. § 866(c).

IX. OTHER ISSUES

The military judge did not abuse her discretion in denying the challenge for cause of Lt. Col. M. The record amply supports the military judge's determination of Lt. Col. M's credibility based on his demeanor and responses. Further, we conclude that a reasonable person hearing Lt. Col. M's responses would not have a perception of unfairness as a result of his sitting as a court member. *See United States v. Youngblood*, 47 M.J. 338 (1997) and cases cited therein.

We agree with appellate government counsel that appellant waived any issue with respect to his confession. That defense counsel did not interpose any objection to appellant's confession, his attack on the legality of the search of appellant's residence notwithstanding. MIL. R. EVID. 103(a)(I). Further, our review of the record discloses no plain error. It is especially noteworthy that SA B, not appellant, terminated his only interview of appellant due to the lateness of the hour. Therefore, appellant forfeited any issue regarding his confession. MIL. R. EVID. 103(d);

United States v. Olano, 507 U.S. 725 (1993); *United States v. Fisher*, 21 M.1. 327, 328-9 (C.M.A. 1986); *see also United States v Tarleton*, 47 M.J 170, 172 (1997).

Appellant also asserts for the first time that the military judge erred when Instructing the members on the conduct unbecoming an officer and a gentleman offense. This offense was based on the inadvertent discovery of numerous photographs and magazines at appellant's work station in his desk. Most of the photographs were of partially clad sunbathers. Some, however, were photographs of male genitilia, including one of appellant, and female genitilia. The magazines depicted nude children, apparently at a nudist colony. Trial defense counsel requested an expansion of the instruction, which was revised, but did not interpose any objection to the instruction given. Our review discloses no error. In view of the nature of the photographs and magazines, and the fact they were inadvertently discovered in appellant's government desk, the instructions were entirely proper. *See United States v. Shober*, 26 M.J. 501 (A.F.C.M.R. 1986). Further, the instruction contained every point trial defense counsel desired covered. This assertion is without merit. RULES FOR COURTS MARTIAL 905(e). 920(f), MANUAL FOR COURTS MARTIAL, UNITED STATES (1995 ed.); see also *United States v Maxwell*, 45 M..J. 406 (1996).

X. DECRETAL

The automatic collection of forfeitures nor included in the sentence of the court-martial pursuant to Article

58b, UCMJ, are declared to be without legal effect. Any such forfeitures already collected from appellant will be restored at the appropriate pay grade. The record of trial is returned to The Judge Advocate General for appropriate action. The case need not be returned to this Court following administrative correction unless further appellate review is required.

Accordingly, the findings and sentence are correct in law and fact, and are hereby
AFFIRMED.

To: Judge YOUNG and Judge SENANDER concur.

OFFICIAL SEAL

UNITED STATES COURT OF CRIMINAL APPEALS

s/LAURA L. GREEN
Clerk of Court